

Rule 13, Ariz. R. Crim. P.

INDICTMENT AND INFORMATION – Duplicitousness: Failure to object to duplicitious charge before or during trial waives the issue on appeal, absent fundamental error.....Revised 11/2009

A duplicitious indictment is one that charges two or more distinct and separate offenses in a single count. Arizona law requires that each charged offense be charged in a separate count in an indictment, information, or complaint. See Rule 13.3(a), Ariz. R. Crim. P.¹ In addition, Article 2, § 23 of the Arizona Constitution guarantees every criminal defendant the right to a unanimous jury verdict.² “Since Arizona law requires that each separate offense be charged in a separate count, an indictment which charges more than one crime within a single count may be dismissed as duplicitious.” *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990). Charging more than one act in a single count is forbidden because it does not provide a defendant with adequate notice of the charge against which he must defend, presents a hazard of a non-unanimous jury verdict, and makes a precise pleading of double jeopardy impossible in the event of a later prosecution. *State v. Davis*, 206 Ariz. 377, 389, ¶ 54, 79 P.3d 64, 76 (2003) [*citing State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989)].

Although a single count of an indictment is duplicitious if it charges more than one criminal act, an appropriate jury instruction can cure any error. In *State v. Petrak*, 198 Ariz. 260, 8 P.3d 1174 (App. 2000), police found guns, drugs, and drug paraphernalia in

¹ That subsection provides in part: “Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if” certain conditions are met.

the defendant's house and also found drug paraphernalia and guns in his truck. The indictment charged him with committing weapons misconduct by possessing a deadly weapon during the commission of a felony, with the underlying felony being drug possession, possession of drug paraphernalia, or possession of drugs for sale. At trial, the defendant claimed that the indictment was duplicitous because it charged him with more than one instance of weapons misconduct in the same count, that is, that it charged him with both the offense of possessing drugs and guns in the house and the offense of possessing them in the truck. The trial court disagreed and the jury convicted the defendant of weapons misconduct. The Court of Appeals reversed that conviction on appeal and remanded for retrial because the trial court's instruction did not require the jury to determine whether the defendant was guilty of the weapons misconduct offense committed in the house, the offense committed in the truck, or both. However, the Court stressed that a duplicitous indictment could be cured by a proper jury instruction:

When an indictment is merely duplicitous – i.e., when two (or more) offenses are charged in the same count of an indictment – the trial court may cure the error by instructing the jurors that they must unanimously agree regarding which offense was committed or that the defendant committed both (or all) of the offenses.

State v. Petrak, 198 Ariz. 260, 268, ¶ 28, 8 P.3d 1174, 1182 (App. 2000).

In the past, the Arizona courts have held that failing to object to duplicity before or during trial constitutes a waiver of that objection, unless the defendant shows he has been prejudiced by the error. *State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054

² That subsection provides in part: "In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."

(App. 1986). However, as will be discussed below, the rule may now be different in light of *State v. Davis*, 206 Ariz. 377, 390, ¶¶ 62-64, 79 P.3d 64, 77 (2003). In *Kelly*, the defendant first pointed a gun at the victim, and then stabbed him with a knife. The defendant was indicted on one count of aggravated assault with a deadly weapon and/or with causing serious physical injury to the victim. He did not object during trial, but argued for the first time on appeal that the indictment was duplicitous. The Court of Appeals agreed that the charge was duplicitous because it accused the defendant of committing aggravated assault in two ways with two results, “and thus there are two separate instances of committing the same crime of aggravated assault.” *Id.* at 116, 716 P.2d at 1053. The Court noted that the trial court could have given an appropriate jury instruction to cure the error if the defendant had objected during trial. However, his failure to make a timely objection constituted a waiver of that objection, and, in any event, he was not prejudiced by the error in light of the overwhelming evidence against him.

In *State v. Rushton*, 172 Ariz. 454, 837 P.2d 1189 (App. 1992), the defendant exposed himself to three children and was charged with one count of indecent exposure. He contended for the first time on appeal that the charge was duplicitous, both because separate counts could have been alleged as to each victim and because the trial testimony showed that he had exposed himself more than once. *Id.* at 455, 837 P.2d at 1190. The Court of Appeals deemed it unnecessary to determine whether the charge was duplicitous, finding that the defendant’s failure to make a timely objection had waived the duplicity issue. The Court explained that the facts of this case clearly showed why a defendant who fails to make a timely objection waives the issue:

If, upon a timely objection by the defense, the indictment had been dismissed without prejudice, the state could have then charged defendant with at least three counts of indecent exposure, one as to each victim, subjecting defendant to the possibility of multiple convictions and multiple penalties. While defendant risked, in the alternative, the possibility of a non-unanimous guilty verdict on the single charge as alleged, his failure to object to the indictment indicates a risk he was willing to take. Defendant simply gambled and lost and cannot now be heard to complain.

Id. at 456, 837 P.2d at 1191.

However, the Arizona Supreme Court may have changed the rule set out in *Kelly* and *Rushton*. In *State v. Davis*, 206 Ariz. 377, 390, ¶¶ 62-64, 79 P.3d 64, 77 (2003), the Court held that the defendant's failure to object to a duplicitous charge at trial did not waive the error because the risk of a non-unanimous jury determination was fundamental error. The defendant was charged with one count of sexual misconduct against one victim, but the State presented evidence of two separate incidents with that victim occurring some eleven days apart. The Court reversed the defendant's conviction on that count, finding that there was fundamental error because there was a "real possibility" that the jury determination was not unanimous. *Id.* at 309, ¶ 59, 79 P.3d at 77. *Davis* thus suggests that a defendant who fails to object to a duplicitous charge at trial may still be able to raise that issue on appeal and prevail on it. Accordingly, any time there is a duplicitous charge, the State should ask the trial court to give a curative jury instruction.